No. 94-947

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1994

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

TOWN & COUNTRY ELECTRIC, INC.
and
AMERISTAFF PERSONNEL CONTRACTORS, LTD,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for
the Eighth Circuit

BRIEF OF AMICI CURIAE ASSOCIATED BUILDERS AND CONTRACTORS, INC., THE NATIONAL ASSOCIATION OF MANUFACTURERS, INTERNATIONAL MASS RETAIL ASSOCIATION, AND INDEPENDENT ELECTRICAL CONTRACTORS, INC. IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

This brief is being filed jointly on behalf of four diverse trade associations, representing large segments of the business community, who are deeply concerned about the effects on employers of the National Labor Relations Board's misguided policy on "salting."[2]

Associated Builders and Contractors, Inc.(ABC) is a national construction industry trade association of more than 17,000 contractors, suppliers and related firms who share the belief that all work should be awarded and performed on the basis of merit, based upon free and open competition, and regardless of labor affiliation. Respondent Town & Country Electric, Inc. is a member of ABC. Other ABC members include H.B. Zachry Co. and Willmar Electric Service, Inc., who have confronted the same issue presented by this case in previous litigation which has been cited to the Court. *See H.B. Zachry Co. v. NLRB*, 886 F. 2d 70 (4th Cir. 1989); *Willmar Electric Service, Inc. v. NLRB*, 968 F. 2d 1327 (D.C. Cir. 1992), *cert. den.* __ U.S. __, 113 S. Ct. 1252 (1993). ABC participated as an amicus before the National Labor Relations Board in connection with the Board's consideration of the present case below.

The National Association of Manufacturers of the United States of America ("NAM"), which is also participating in this brief as amicus curiae, is the nation's oldest and largest broad-based industrial trade association. Its more than 13,000 member companies and subsidiaries, including 9,000 small manufacturers, employ approximately eighty five percent of all manufacturing workers and produce over eighty percent of the nation's

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[1] Letters of consent to the filing of this brief have been filed with the Clerk of the Court pursuant to Court Rule 37.3

[2] The term "salting," as used here and in the decision of the court of appeals below, refers to the practice of paid union organizers posing as applicants for employment or as employees of an employer whom they are seeking to organize as agents of the union.

manufactured goods. More than 158,000 additional businesses are affiliated with the NAM through its Associations Council and National Industrial Council.

The NAM and its councils are vitally interested in ensuring that federal laws relating to employee relations are enforced reasonably and fairly, so as not to impair the ability of manufacturers to compete in the world market. To this end, the NAM has filed briefs in a variety of cases involving employee relations issues, including *Willmar Electric Service, Inc. v. NLRB*, 968 F. 2d 1327 (D.C. Cir. 1992), cert. den. __ U.S. __, 113 S. Ct. 1252 (1993).

The International Mass Retail Association (IMRA) represents 170 mass retail chains that include full-line and specialty discount stores, home centers, catalogue showrooms, dollar stores, variety stores, warehouse clubs, deep discount drugstores and off-price stores. Collectively IMRA retail members operate more than 54,000 stores in the U.S. and abroad and employ well over a million people. IMRA's members represent the overwhelming majority of the approximately $245 billion mass retail industry. IMRA is deeply concerned that labor law is interpreted and enforced in ways that do not infringe on the rights of employers to operate their businesses. IMRA has participated as an amicus in, among other cases, *Lechmere, Inc. v. NLRB*, __ U.S. __, 112 S. Ct. 841 (1992).

Independent Electrical Contractors, Inc. is a national trade association comprising 2,000 electrical contractors. Respondent Town & Country Electric, Inc. is one of IEC's larger members. Many of IEC's other members are small, family owned businesses who lack the financial resources to protect themselves against the types of union activity at issue in this case. IEC members believe that their employees should have the freedom to make their own determinations whether or not to seek union representation. IEC members do not believe, however, that they should be forced to hire outside, paid professional

union organizers, whose purpose in seeking employment is to serve the adversarial interest of a union, often to the detriment of the employer.

Members of ABC, NAM, IMRA, IEC (hereafter the Joint Amici) and other business groups have been unfairly targeted by labor organizations, including the intervenor International Brotherhood of Electrical Workers and the amicus International Brotherhood of Boilermakers, with the widespread use of "salting" tactics and the filing of hundreds of unfair labor practice charges on a nationwide basis. The Joint Amici each strongly support the right of bona fide employees and employee applicants to engage in concerted, protected activity within the meaning of the National Labor Relations Act or to refrain from such activity. The policies of the National Labor Relations Board with regard to paid, professional union organizers, however, have led to a gross abrogation of the rights of employers to select bona fide employees who are not paid agents of an outside organization bearing an inherent conflict of interest.

This important issue is by no means limited to the construction industry. The Joint Amici are jointly filing this brief so that the Court understands that this issue is of great significance to employers in a wide variety of industries, many of whom have received, or may receive in the future, applications from paid, professional employees of outside labor organizations, pursuant to the Board's misguided policy. The Joint Amici believe that employers should not be required to treat paid, professional union organizers as if they are bona fide applicants for employment, when they clearly are not.

The Joint Amici are filing this brief in support of the Respondent and ask that the decision of the Eighth Circuit (and the similar analysis of the Fourth Circuit) be upheld in all respects. The Court of Appeals has properly harmonized the Act with settled common law principles of employment. By contrast, the policies advocated by the Board ignore the realities

of the workplace and unacceptably blur the distinction between bona fide employees and outside union agents. As is further explained below, this Court should therefore hold that paid, professional union organizers are not "employees" within the meaning of the Act.

SUMMARY OF ARGUMENT

The Board's policy on "salting" is inconsistent with this Court's long recognized distinction between bona fide employees and non-employee outside union agents. *Lechmere, Inc. v. NLRB*, __ U.S. __, 112 S. Ct. 841 (1992). Contrary to the Petitioner's arguments, the Act itself excludes employees of labor organizations from the statutorily protected definition of "employees" (or employee applicants). *See* 29 U.S.C. §§ 152(2) and 152(3). The Board's distorted view of the Act's legislative history and plain language undermines the entire rationale for the agency's "salting" policy.

By contrast, the Court of Appeals' analysis is logically consistent and conforms the statutory definition of employees with long accepted traditions of common law agency in the workplace. *See* Restatement of Agency (Second) (1957); *Nationwide Mutual Ins. v. Darden*, __ U.S. __, 112 S. Ct. 1344 (1992). An employee of a labor organization who purports to seek employment with a business in order to serve the union's organizational objectives bears an unavoidable conflict of interest. The regulated conflict between organized labor and management is central to the Act, and it is wrong to compel employers to hire union agents who inherently serve a different master. *See also NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974).

The Board has confused the issue by asserting that the holding of the court of appeals somehow jeopardizes the organizational rights of bona fide employees. The conflict of interest does not arise from an employee's desire to support a union, but

only arises if an individual is *employed* by the union as its paid, controlled agent.

Finally, the Board's policy has led to preposterous and unfair results. There is widespread disbelief in the employer community that any policy can be consistent with the Act which requires employers to hire paid union agents bent on organizing their businesses. The Board's policy has led to substantial abuse of unfair labor practice procedures and the perception that the weight of government action now supports union access to private workplaces, in a manner which had previously been declared to be inconsistent with the Act. This Court's intervention is urgently required to prevent further enforcement of the Board's misguided policy.

ARGUMENT

I. THE BOARD'S POLICY ON "SALTING" IGNORES THE SETTLED DISTINCTION BETWEEN THE PROTECTED RIGHTS OF BONA FIDE "EMPLOYEES" AND THE UNPROTECTED DEMANDS OF NON-EMPLOYEE AGENTS OF OUTSIDE LABOR ORGANIZATIONS.

This Court has long recognized a distinction between the rights of bona fide employees to engage in concerted, protected activity, and the unprotected demands for access to the workplace by non-employee union organizers. In *Lechmere, Inc. v. NLRB*, __ U.S. __; 112 S. Ct. 841, 845 (1992), the Court held that employers were entitled to refuse to permit non-employee union organizers onto private property. As the Court stated: "By its plain terms,...the NLRA confers rights only on employees, not on unions or their nonemployee organizers." *See also NLRB v. Babcock & Wilcox*, 351 U.S. 105, 113 (1956).

The practice of "salting" which is at issue in the present case constitutes nothing less than an attempt by non-employee union organizers to evade the holdings of *Lechmere* and *Babcock & Wilcox*. [3] By posing as "employees" (or employee applicants), the unions' paid, professional agents are seeking to gain otherwise prohibited access to the workplace. The National Labor Relations Board's rulings have permitted the unions to achieve their objective by reading out of the Act the settled distinction between bona fide employee applicants and non-em-

[3] *See also Central Hardware Co. v. NLRB*, 439 F. 2d 1321, 1328 (8th Cir. 1971), *revd on other grounds*, 407 U.S. 539 (1972), cited in *Lechmere*. In *Central Hardware*, a non-employee union organizer posed as a "customer," claiming invitee rights of access to the employer's store. The court of appeals properly rejected the union's claim stating: "The company had the right to bar [the union agent] from the store; he was not a bona fide customer...."

ployee union agents. The Board's policy is at odds with the history and purpose of the Act and the holdings of this Court. [4]

Citing only the Act's broad definition of "employee" status and inapposite case law, the Petitioner briefs have begged the question as to the separation between employees and non-employee union agents. Cases dealing with employee applicants in general (*Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 181-188 (1941)) or aliens (*Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984)) or supervisors (*NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 130 (1944)) say nothing with regard to the plain statutory distinction between employees and outside organizers.

On the other hand, Congress's intent to treat paid employees of labor organizations differently from bona fide employees or employee applicants is confirmed by Section 2(2) of the Act, 29 U.S.C. 152(2), when read in *pari materia* with Section 2(3),

[4] The Amicus ACLU, and to a lesser extent the Board, has attempted to distinguish *Lechmere* and *Babcock* on the grounds that the employers in those cases sought to apply a neutral rule against solicitation by all outside organizations, whereas Town & Country supposedly "claims the right to discriminate against anyone who might speak favorably about unions." ACLU Brief at 22. The ACLU argument falsely characterizes both *Lechmere* and the present case. In *Lechmere*, this Court correctly authorized employers to distinguish between bona fide employees, who were entitled to solicit on company property, and outside, non-employee union organizers, who could be lawfully denied access. Here, Town & Country has not claimed any right to discriminate against anyone based on their "speech" in support of union activities. The employer has merely limited its invitations for employment (access) to bona fide employee applicants, *i.e.*, those who do not seek to remain employed by an outside labor organization with an inherent conflict of interest, and the company has properly denied access (employment) to outside union organizers, *i.e.*, those applicants who seek to remain employed by an adversarial labor organization. There is no contention here that Town & Country has offered employment to any other agents of outside, adverse organizations who have expressed a similar intention to continue serving the interests of that other employer while purporting to work for the company. Thus, there has been no discrimination by Town & Country in any manner prohibited by *Lechmere*.

29 U.S.C. 152(3). Section 2(3) excludes from the definition of "employee" any individual employed "by any ... person who is not an employer as herein defined [in Section 2(2)]". Section 2(2) plainly states that the term "employer," "shall not include ... any labor organization (other than when acting as an employer)...."

Thus, contrary to Petitioners' claims, Congress has spoken directly to the issue now before the Court. Consistent with the holding of *Lechmere*, Congress never intended for paid employees of unions to be able to claim the protections of the Act when seeking employment for the purpose of organizing an "employer," all the while maintaining their status as paid, professional employees of their union.

Congress was well aware of the distinction between a union's relationship with its own employees regarding their own wages, hours, and terms and conditions of employment and the union's employment of such individuals in the capacity of professional organizers, seeking to organize the true "employees" of "employers" within the meaning of the Act. *See* S. Rep. No. 573, 74th Cong. 1st Sess. 6 (1934) *reprinted in* 2 Legislative History of the National Labor Relations Act 2300, 2305 (1935). *See also* S. Rep. No. 1184, 74th Cong., 2d Sess. 4 (1934), *reprinted in* 1 Legislative History of the National Labor Relations Act 1099, 1102 (1935) (distinguishing between a union's relations with its "clerks, secretaries and the like" and its actions as an advocate of unionization).

In the present case and others like it, the Board's distorted view of the Act's legislative history has undermined its entire policy on "salting," causing it to force employers into the untenable position of treating outside union agents as if they are no different from bona fide employees or employee applicants.[5]

[5] The Petitioners have erroneously stated that there is "no difference" between the types of activities which a paid union agent may engage in and the type of conduct which may be engaged in by a bona fide employee who happens to support unionization. Pet. App. 28a; Brief of Petitioner NLRB at 24. In reality, however, the difference is fundamental: The bona fide employee has a statutorily protected right to engage in pro-union activities while working for an employer, while the outside, paid union agent has no right to force himself into a resisting employers workplace. *Lechmere, Inc. v. NLRB*, *supra*, 112 S. Ct. at 845.

For this reason, the Court of Appeals properly denied enforcement of the Board's order, and the court's decision should be upheld.

II. ONLY THE COURT OF APPEALS' ANALYSIS PROPERLY APPLIES COMMON LAW DEFINITIONS OF EMPLOYEE STATUS.

Not only was the Court of Appeals correct in finding the Board's interpretation of the Act to be unreasonable, but the court's own analysis is also compelled by long accepted common law (and common sense) understandings of employee status in the workplace. As this Court held in *Nationwide Mutual Ins. Co. v. Darden*, __ U.S. __, 112 S. Ct. 1344, 1348 (1992), Congress intended in the NLRA to "describe the conventional master-servant relationship as understood by common-law agency doctrine." The Board's holding is utterly inconsistent with settled principles of agency, as the Court of Appeals properly found, because the Board would ignore the plain conflict of interest which precludes a paid union agent from serving two masters.

Under common law, an agent has a duty to act solely for the benefit of his principal. The Restatement (Second) of Agency at § 394 (1957) specifically precludes an agent from acting on behalf of a person whose interests conflict with those of the principal in matters in which the agent is employed. Therefore, a person cannot be the servant to two masters at one time if service to one involves abandonment of or conflict with service to the other. *Id.* at § 226. Nor is a prospective employer required to accept an applicant's promise to somehow overcome such inherent conflicts. The employer has the right to exercise

control over its workplace so as to *avoid* employing individuals who seek to continue simultaneous service for conflicting employers. *Id.* at comment a.[6]

In its attempt to avoid the clear mandate of these settled agency principles, the Board has constructed an elaborate fiction, asserting in the face of decades of labor law that unions do not have a conflict of interest with employers. Pet. App. 37a; NLRB Brief at 23-30. In addition, the Board has once again confused the protected right of bona fide employees to engage in protected activity, which is not at issue here, with the inherent conflict of interest presented by a paid *employee of a labor organization* who seeks employment with an employer whom he is being paid by the union to organize.

From the earliest days of the drafting and passage of the Wagner Act to the present, American labor law has been designed to regulate and control organized labor and management as "separate factions in warring camps." *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 494 (Douglas, J. dissenting)(1947), quoted with approval in *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 278 (1974) Recognition of the fundamentally separate interests of organized labor and management has been in many ways central to the structure of the Act, as this Court has

[6] Individual Board members have long recognized that these common law agency principles conflict with the notion of treating paid union organizers as bona fide "employees" under the Act. *See Oak Apparel, Inc.*, 218 NLRB 701, 702 (1975)(Kennedy, dissenting)("I personally have great difficulty in understanding how an individual can be an employee of two different employers at the same time for the same working hours. There is a certain master-servant relationship which is absent under such circumstances."). Numerous commentators have also recognized the inconsistency between the Board's salting policy and the common law. *See* Adams, Conflict of Interest of Bona Fide Employees: The Status of Paid Union Organizers, Lab. L.J. 98, 103-4 (Feb. 1995); Howe, To Be or Not Be An Employee: That is the Question of Salting, 3:2 Geo. Mason Ind. L. Rev. 1 (1995); Northrup, Salting the Contractors Labor Force: Construction Unions Organizing With NLRB Assistance, XIV J. Lab. Res. 469 (Fall, 1993).

repeatedly held. *NLRB v. Bell Aerospace Co., supra*[7] ; *Lechmere, Inc. v. NLRB, supra*. It is incredible that the Board would at this late date attempt to ignore the statutory conflict of interests between labor organizations and employers.

The Board has repeatedly confused the issue in this case by claiming that recognition of the conflict of interests between unions and employers somehow deprives true employees of their rights to engage in union organizing. Thus, the Board states: "[A] worker for hire does not surrender his status as an "employee" by engaging in union organizing ...." (NLRB Brief at 17). This statement is true only if the worker is an "employee" in the first place, i.e., only if he is not a paid, professional agent of an outside labor organization who inherently is subject to an irreconcilable conflict of interest.

Put another way, bona fide employees do not have a conflict of interest when they seek to organize themselves or support union activities, because they are not "employed" by a union to engage in such conduct. Rather, they engage in such activities for their own "mutual aid and protection," as expressly protected by Section 7 of the Act. Outside union agents who seek to organize a workplace, on the other hand, are serving only

[7] This Court's decision in *NLRB v. Bell Aerospace Co., supra*, is oddly not mentioned in the Board's brief, yet it holds many important lessons for the outcome of the present case. There as here, the Court dealt with a category of workers, "managerial employees," which the Board had determined to be included within the definition of "employee," largely because they had not been expressly excluded from the statutory definition. The Court examined the inherent conflict of interest which would result from including managers in the employee definition and noted previous congressional reversals of Board rulings which had blurred the distinction between labor and management, quoting at length from Justice Douglas's dissent in *Packard Motor Car Co. v. NLRB, supra*. The Court in *Bell Aerospace* further observed: "[I]t would also be appropriate for the Board to exclude employees from a unit on the ground that their participation in a labor organization would create a conflict of interest with their job responsibilities." 416 U.S. at 290, n.20.

the interests of their true employer, the union, in a manner not covered by Section 7, and in a manner which clearly conflicts with any claim of bona fide employee status.[8]

Again, the Court of Appeals stated the issue properly:

> Were this a case involving a typical job applicant, we might well agree that an employee may be simultaneously loyal to his union and to his nonunion employer. The two union organizers, however, were not typical applicants. They were not in search of a job; they already had one.

Pet. App. at 9a. *See also Ultrasystems Western Constructors, Inc. v. NLRB*, 18 F. 3d 251, 254 (4th Cir. 1994); *H.B. Zachry Co. v. NLRB*, 886 F. 2d 70, 74(4th Cir. 1989).[9]

For similar reasons, the Court of Appeals has also correctly held that job applicants are not bona fide "employees" where they are subject to the union's control in the form of the salting resolution set forth in the present record. Again, it is not a question of the applicant's motivation but of their employment status. The degree of control exercised by the union over these

[8] The Boilermakers Union, as an amicus in support of the Board, incorrectly states that the court of appeals analysis rests on questions of "motivation." (Amicus Br. at 5-20). To the contrary, the court's holding rests solely on the readily definable *status* of the individual: bona fide employees of an employer who engage in union activity are protected by the Act; outside union agents who are employees of a labor organization cannot also be bona fide employees of the employer and hence are not entitled to the protections of Section 7 of the Act.

[9] It is disingenuous for the Board to pretend that no conflict of interest exists when a paid union organizer applies for a job with a non-union company, while at the same time the Board has acknowledged that a conflict does exist when the paid organizer applies for work as a striker replacement. *Sunland Const. Co., Inc.*, 309 NLRB 1224, 1230-1231 (1992). Employees have a protected Section 7 right to strike, just as they have the right to organize. It is much more logical and consistent to say, as the Court of Appeals has done, that in either case the paid union organizer has *no* protected rights because he is not a bona fide "employee."

individuals clearly renders them employees or agents of the union and disqualifies them from acting as bona fide employees of the employer to whom they have ostensibly applied for work.

The Court of Appeals' analysis, unlike that of the Board, is logically consistent and leads to understandable, fair results based on well established concepts of agency in the master and servant context. The court's decision should be upheld accordingly.

III. THE BOARD'S INTERPRETATION OF THE ACT HAS LED TO UNFAIR RESULTS WHICH IGNORE THE REALITIES OF THE WORKPLACE AND ARE INCONSISTENT WITH THE POLICIES UNDERLYING THE NATIONAL LABOR RELATIONS ACT.

As a result of the Board's misguided policy on "salting", there are now huge numbers of unfair labor practice charges pending throughout the country involving paid union organizers. Report of the General Counsel (NLRB 1994). The number of charges has continued to increase, not only because of the unions' concerted efforts to exploit the Board's rulings in their favor, but also because the Board's pronouncements are viewed as unfair and counter-intuitive by the vast majority of employers. Employers simply cannot believe the notion that they can be forced to hire professional union agents, who will be paid by and remain under the control of the union.

Some employers, who have hired the unions' paid agents solely in order to avoid unfair labor practice charges, have been equally frustrated, as the union professionals have been trained to provoke disciplinary actions or discharges so that new charges can be filed. Pet. App. 9a. Union leaders have frankly stated that their ultimate objective in the "salting" programs is to force non-union employers to increase their costs by hiring lawyers to defend against increased unfair labor practice charges.[10]

[10] *See* Northrup, Salting the Contractors Labor Force: Construction Unions Organizing with NLRB Assistance, XIV J. Lab. Res. 469, 479 (Fall,

The present ongoing abuse of Board processes must not be allowed to continue. Intervention by this Court is necessary to uphold the opinion of the Court of Appeals and to correct the misguided holdings of the Board. The Board's "salting" policy ignores the realities of the workplace and defies common sense, and should be denied enforcement.

IV. Conclusion

For the reasons stated above and in the Respondent's Brief, the decision of the Court of Appeals should be affirmed and the order of the Board should be denied enforcement.

Respectfully submitted,

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1993): "[S]alters are often not interested in permanent employment. Rather they frequently are devoted to harassment, destruction of productivity, or even ... elimination of the company itself unless it changes its ways and agrees to unionization."